

Commonwealth Of Kentucky

Court of Appeals

NO. 2003-CA-002699-MR

EMMA LOU REED; AND
BRYAN GOWIN, HER ATTORNEY

APPELLANTS

v. APPEAL FROM JEFFERSON FAMILY COURT
HONORABLE JOSEPH W. O'REILLY, JUDGE
ACTION NO. 02-CI-503959

BRODERICK GLENN REED

APPELLEE

OPINION
AFFIRMING IN PART,
VACATING IN PART AND REMANDING

** ** * * *

BEFORE: BARBER AND JOHNSON, JUDGES; MILLER, SENIOR JUDGE.¹
JOHNSON, JUDGE: Emma Lou Reed and her attorney, Bryan Gowin,
have appealed from an order of the Jefferson Family Court
entered on November 3, 2003, which denied Emma's motion for
modification of Broderick Glenn Reed's child-support obligation
and denied Gowin attorney's fees. Having concluded that the

¹ Senior Judge John D. Miller sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

family court failed to make sufficient findings of fact regarding the child-support award, we vacate that part of the order and remand for further proceedings. Having further concluded that the family court did not abuse its discretion in refusing to award attorney's fees, we affirm on that issue.

Emma and Broderick were married on August 30, 1996, in Jefferson County, Kentucky. One child was born during the marriage, namely Devin Alexander Reed, whose date of birth is November 17, 1997. Emma filed a petition for dissolution of marriage on October 1, 2002.

On December 23, 2002, the parties submitted a handwritten settlement agreement to the family court. The agreement provided that the parties would have joint custody of Devin, and that neither party would pay child support.² Broderick was required to pay all of the daycare expenses until Devin started kindergarten in August 2003.³ Thereafter, the parties would equally divide the child-care costs. Broderick was to provide health insurance coverage for Devin, and any non-covered medical expenses incurred were to be divided equally between the parties.⁴ Both parties and their respective attorneys signed the

² The agreement stated: "No child support shall be due or owing at this time."

³ Although not specifically stated in the agreement, it is clear that Devin would primarily reside with Emma based on Broderick's visitation schedule.

⁴ The agreement also addressed the division of marital property and debts; however, these issues are not relevant to this appeal.

agreement. The family court entered a decree of dissolution of marriage on December 27, 2002, which incorporated the settlement agreement as not unconscionable, but it did not make any other findings of fact or conclusions of law.

On July 16, 2003, Emma filed a motion to set child support. In essence, Emma claimed that Broderick was not exercising his visitation as set forth in the parties' settlement agreement, and because of the financial disparity between the parties she was entitled to child support from Broderick since she was Devin's primary custodian, having him in her custody more than one-half of the time. Emma's motion also requested that Broderick pay the attorney's fees she incurred in bringing the motion for child support before the family court.

On July 30, 2003, Emma filed a motion to modify visitation, wherein she requested that she be allowed to enroll Devin in school in the district where she resided, and that Devin be allowed to reside with her during the entire school week, with Broderick having visitation with Devin every other weekend. She also requested that Broderick pay the attorney's fees she incurred in bringing the motion to modify visitation.

On August 13, 2003, the family court held a hearing on Emma's motion to modify the visitation schedule. In an order entered on August 15, 2003, the family court allowed Emma to enroll Devin in kindergarten in the district where she resided,

but it did not modify the visitation schedule previously set forth in the settlement agreement. However, the family court did order Broderick to pay the full amount of the child-care costs until further order of the court. The motion for attorney's fees was passed until the family court entered an order on the motion to set child support.

On October 22, 2003, the family court held a hearing on Emma's motion for child support. In its order entered on November 3, 2003, the family court noted that the parties had previously agreed that neither party would pay child support. Further, although Broderick was only required to pay one-half of the child-care costs, he was currently paying the entire amount.⁵ The family court stated that "[t]he parties knew going into the Agreement that that amount of money owed by [Broderick] for daycare costs would decrease in August 2003, because of both the reduced cost of childcare once the child entered school and the understanding that the parties would split the costs of the after school care evenly." The family court denied the motion for child support on the grounds that no material and continuing change of circumstances had occurred. Further, the family court denied Emma's requests for attorney's fees.

On November 12, 2003, Emma filed a motion to alter, amend, or vacate the family court's denial of her motion for

⁵ This statement is inconsistent with the August 15, 2003, order which stated that Broderick was required to pay the entire amount of the child-care costs.

child support and attorney's fees. Broderick responded on November 24, 2003. The family court entered an order on December 4, 2003, denying Emma's motion. This appeal followed.

Emma argues on appeal that the family court abused its discretion in refusing to modify the parties' child-support agreement. Emma contends that the family court should have modified the portion of the agreement relating to child support because of the financial disparity between the parties and the fact that Broderick had missed several visitation periods with Devin and she had custody of him over one-half of the time.

In reviewing a determination of child support, we must determine whether the trial court's factual findings are clearly erroneous, whether the trial court applied the correct law to those factual findings, and whether its ultimate determination was an abuse of discretion.⁶ Where there is evidence of substance and relevant consequence sufficient to induce conviction in the minds of reasonable people that supports the trial court's finding, that finding is not clearly erroneous.⁷ After the trial court applies the correct law to its factual findings, it is within its sound discretion to make the ultimate determination setting child support. For that discretion to be deemed an abuse of discretion it must constitute arbitrary

⁶ See Sherfey v. Sherfey, 74 S.W.3d 777, 782-83 (Ky.App. 2002).

⁷ Id.

action or capricious disposition under the circumstances, at least an unreasonable and unfair decision.⁸

In setting or modifying child support, a family court has the discretion to deviate from the child-support guidelines.⁹ A family court has the discretion to deviate from the guidelines when it finds that the parties have entered into an agreement concerning child support and that agreement is not unconscionable.¹⁰ However, a separation agreement may not preclude or limit modification of child support,¹¹ and a family court retains jurisdiction over child support and is not permanently bound by the parties' agreement to forego child support.¹²

After reviewing the record below, we conclude the family court erred by not making sufficient findings as to whether a modification of child support would be appropriate under the circumstances. Because the parties signed a settlement agreement three months after Emma filed her petition for dissolution and agreed that neither of them would pay child support, the family court at the time of the dissolution did not

⁸ Sherfey, 74 S.W.3d at 782-83.

⁹ Rainwater v. Williams, 930 S.W.2d 405, 407 (Ky.App. 1996).

¹⁰ KRS 403.180. See also Whicker v. Whicker, 711 S.W.2d 857, 859 (Ky.App. 1986).

¹¹ KRS 403.180(6).

¹² Tilley v. Tilley, 947 S.W.2d 63, 65 (Ky.App. 1997).

calculate any amount for child support based on the guidelines.¹³ When the family court considered Emma's motion to modify the award of no child support, it did not have an initial amount of child support to use as a base in determining whether there was grounds for a modification, and it failed at that time to establish what the amount would have been at the time of dissolution. On remand, the family court should calculate the amount at which the child support would have originally been set based on the guidelines without the parties' agreement to forego child support. This will allow the family court to determine whether a change in circumstances has occurred that will support a modification. While the separation agreement specifically states "[n]o child support shall be due or owing at this time[,]" the question is whether a change in circumstances now entitles Emma to child support.¹⁴

Following its determination of what the original child-support award would have been, the family court must then determine, pursuant to KRS 403.213,¹⁵ whether the difference in

¹³ See Clary v. Clary, 54 S.W.3d 568, 571 (Ky.App. 2001) (stating that "KRS 403.211(3) requires a trial court to make written findings that application of the guidelines would be unjust or inappropriate in a particular case").

¹⁴ Whicker, 711 S.W.2d at 859 (stating that "[a] parent's obligation to support a child may not be absolutely waived by any contract between the parties").

¹⁵ KRS 403.213 states, in part, as follows:

- (2) Application of the Kentucky child support guidelines to the circumstances of the parties

the calculation of what the original award of child support would have been and the calculation of the current amount of child support, from the date of the filing of Emma's motion for modification, constitutes a change sufficient to support modification of the child support. If the original amount of child support based on the guidelines and the current child support calculation based on the guidelines differs by 15% or more, then Emma is entitled to modification of the original amount of child support based on the guidelines unless the family court makes specific findings to justify a deviation from the guidelines pursuant to KRS 403.211.¹⁶ The family court may

at the time of the filing of a motion or petition for modification of the child support order which results in equal to or greater than a fifteen percent (15%) change in the amount of support due per month shall be rebuttably presumed to be a material change in circumstances. Application which results in less than a fifteen percent (15%) change in the amount of support due per month shall be rebuttably presumed not to be a material change in circumstances.

¹⁶ KRS 403.211 states, in part, as follows:

- (3) A written finding or specific finding on the record that the application of the guidelines would be unjust or inappropriate in a particular case shall be sufficient to rebut the presumption and allow for an appropriate adjustment of the guideline award if based upon one (1) or more of the following criteria:
 - (a) A child's extraordinary medical or dental needs;
 - (b) A child's extraordinary educational, job training, or special needs;

also consider the times the parties have possession of Devin and the expenses that each incurs in determining whether each party's expenses have significantly changed so as to affect an award of child support.

Finally, Emma contends the family court erred by not ordering Broderick to pay the attorney's fees associated with bringing her motions before the family court. Specifically, Emma asserts that given the disparity in the financial resources of the parties, the family court's decision was an abuse of discretion.

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- (c) Either parent's own extraordinary needs, such as medical expenses;
 - (d) The independent financial resources, if any, of the child or children;
 - (e) Combined monthly adjusted parental gross income in excess of the Kentucky child support guidelines;
 - (f) The parents of the child, having demonstrated knowledge of the amount of child support established by the Kentucky child support guidelines, have agreed to child support different from the guideline amount. However, no such agreement shall be the basis of any deviation if public assistance is being paid on behalf of a child under the provisions of Part D of Title IV of the Federal Social Security Act [footnote omitted]; and
 - (g) Any similar factor of an extraordinary nature specifically identified by the court which would make application of the guidelines inappropriate.
- (4) "Extraordinary" as used in this section shall be determined by the court in its discretion.

KRS 403.220 reads, in relevant part, as follows:

The court from time to time after considering the financial resources of both parties may order a party to pay a reasonable amount for the cost to the other party of maintaining or defending any proceeding under this chapter and for attorney's fees, including sums for legal services rendered and costs incurred prior to the commencement of the proceeding or after entry of judgment. . . .

In a dissolution proceeding, the allocation of attorney's fees is "entirely within the discretion" of the family court.¹⁷ As the family court is in the best position to observe the conduct and tactics of the parties, broad discretion shall be given to the family court's allocation of attorney's fees.¹⁸ A reviewing court will not disturb the family court's refusal to award attorney's fees absent an abuse of discretion.¹⁹

A review of the record does not reveal that the family court's decision was arbitrary or capricious under the circumstances. When Emma and Broderick signed the settlement agreement, they were both awarded an equitable share of the marital property, and there was no indication that Emma lacked the financial resources to pay her attorney's fees. Thus, the

¹⁷ Neidlinger v. Neidlinger, 52 S.W.3d 513, 519 (Ky. 2001).

¹⁸ Id.

¹⁹ See Giacalone v. Giacalone, 876 S.W.2d 616, 620-21 (Ky.App. 1994) (citing Gentry v. Gentry, 798 S.W.2d 928 (Ky. 1990); and Wilhoit v. Wilhoit, 521 S.W.2d at 512).

family court did not abuse its discretion by refusing to award attorney's fees to Emma.

Accordingly, the order of the Jefferson Family Court as it relates to attorney's fees is affirmed. However, as the order relates to the motion to modify child support, it is vacated, and this matter is remanded to the family court for further proceedings consistent with this Opinion.

ALL CONCUR.

BRIEF FOR APPELLANTS:

Bryan Gowin
Louisville, Kentucky

BRIEF FOR APPELLEE:

Steven S. Reed
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